

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COLLEGE PRODUCTS, INC.,

Petitioner,

v.

INTIRION CORPORATION,

Patent Owner.

Case No. PGR2024-00004

Patent No. 11,674,746

**PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION UNDER
37 C.F.R. § 42.52(a) TO APPLY FOR SUBPOENA UNDER 35 U.S.C. § 24 TO
COMPEL TESTIMONY AND PRODUCTION OF DOCUMENTS FROM
NORTHEASTERN UNIVERSITY**

Patent Owner (“Intirion”) respectfully opposes Petitioner (“CP”)’s motion to compel discovery from Northeastern University in the form of some unknown declaration or testimony¹ and some ambiguous documents. CP’s motion should be denied, at least because it does not satisfy the standard under *Garmin* and presents no threshold showing under *Bloomberg* as to Northeastern (or the librarian). It instead amounts to a fishing expedition for 10-plus-year-old documents Northeastern apparently did not keep, from a librarian who lacks any personal knowledge of the documents in question. CP cannot satisfy the “compelled” discovery requirements. *See* Consolidated Trial Practice Guide at 29. CP’s motion is also untimely. CP’s delay is unfairly prejudicing Intirion, and if the motion is granted, it will continue to do so through an inevitable motion to exclude.

I. COLLEGE PRODUCTS CANNOT SHOW GOOD CAUSE

A. Factor 1: CP Made No Specific Factual Showing of Usefulness

CP’s argument for documents and testimony is CP’s conclusory assertion that Ms. Sweeney, a librarian at Northeastern University, “indicated that Northeastern possesses documents confirming that ISDU was publicly available no later than November 2013” and “provided information indicating the public availability of

¹ CP is ambiguous as to the “testimony” it seeks—varying between a declaration or testimony—and at least implies CP is not intending to comply with its obligations to make the witness available for cross-examination.

ISDU via IRis . . . by that date.” This general statement does not satisfy CP’s burden to provide a specific factual reason for reasonably expecting any discovery would be “favorable in substantive value to a contention of the party moving for discovery.” *Bloomberg, Inc. v. Markets-Alert Pty, Ltd.*, CBM2013-00005 (PTAB May 29, 2013) (Paper 32) at 5 (“The mere possibility of finding something useful, and mere allegation that something useful will be found, are insufficient . . .”).

Moreover, CP’s flippant statement is directly *contradicted* by Ms. Sweeney’s plain statements. (Ex. 1024). Far from showing any “useful” information, Ms. Sweeney states the following:

- We migrated away from the IRis system in 2015, so unfortunately ***I cannot confirm the exact date the paper was made available to the public***
- ***This was a few years before my time at Northeastern***, so I can’t say for certain that was the reason! But, ***I can tell you that the paper was not available in IRis before December 2009.***
- [Northeastern] did not keep any technical or administrative metadata in the migration, so ***I have no documentation that would indicate whether or not the file was public*** (and therefore indexed by Google and other major search engines) or private during the time it was in IRis [*i.e.*, until 2015].
- It’s been nearly 10 years since I worked in materials with IRis, so ***my memory of the workflows are quite fuzzy!***

(Ex. 1024 at 5 (emphasis added)). This plainly undercuts CP’s contention that ISDU was publicly available any time prior to 2015 (let alone in 2007). Regardless, CP cites no cases where a person admitting to lack personal knowledge—with relevant

facts being before her time—and to having “no documentation” was considered a sufficient threshold showing, beyond speculation, that something useful to public availability will be uncovered. Nor could it. The evidence overwhelmingly weighs against anything “useful” being uncovered. Despite being “the Head of Digital Production Services at Northeastern Library,” Ms. Sweeney admits she has no personal knowledge and the events occurred before her time. She also admits any guesses are based on a “fuzzy” memory as it has been nearly 10 years since the IRis system was discontinued. On this alone, CP’s motion fails. Further, regardless of whether this motion is granted, CP is unlikely to receive Ms. Sweeney’s testimony/declaration on this unfavorable information. She stated the (unprovided) declaration would have needed modifications. And Northeastern said it would not allow her to testify or provide a declaration, and it would instead designate an unknown records keeper. (Ex. 1024 at 1).

Turning to the only potential “document” identified—an excerpt “December 2013 email from Bepress” (a third party not affiliated with Northeastern)—this too is not “useful” to CP. Its contents are inadmissible hearsay, for which Northeastern has no personal knowledge, cannot authenticate, and still do not relate to ISDU being “publicly available.” To the extent this email is even produced, it too would inevitably be excluded. This is an inappropriate fishing expedition that, at most, will result in unhelpful documents and “fuzzy” speculation with no personal knowledge.

B. Factor 3: CP Did Not Seek Discovery from Others

CP makes no showing this information is only available from Northeastern's library. To Intirion's knowledge, CP did not contact ISDU's authors, Bepress, or anyone else. Thus, CP cannot satisfy its burden for *Garmin* Factor 3.

C. Factor 4: CP's Minimal Instructions Are Ambiguous

It is not clear if or what documents and testimony CP is seeking. CP did not include any exemplary requests for documents or topics for deposition/declaration (something required if CP is seeking to depose Northeastern). It also appears CP is seeking to skirt its requirement for any testimony to be subject to cross-examination by Intirion. *See* Trial Practice Guide, Appendix D (noting compelled testimony should occur by oral examination). CP fails to satisfy *Garmin* Factor 4.

D. Factor 5: CP's Requests Are Overbroad and Unduly Burdensome

CP's motion should also be denied under Factor 5 due to the ambiguous and broad nature of the requests, CP's delay and the lack to time for response, and the high likelihood this will result in any document and information being excluded.

CP has not meaningfully described what it seeks beyond information that "indicates" public availability. It is unclear if CP is requesting any information about the IRis system. If so, Northeastern will face a great burden to respond, including because IRis has not been used since before 2015. CP's request is also unduly burdensome due to the limited time left to comply with the schedule. If granted, Northeastern would have to obtain and produce documents, a deposition would need

to be taken, all within the matter of weeks. Intirion would then have to respond to a new theory in a fraction of the time it is statutorily allowed, because CP's contention *was* that ISDU was publicly available in 2007. This would also lead to follow-on discovery and inevitably a motion to exclude. For this reason too, CP's motion should be denied.

II. COLLEGE PRODUCTS'S DELAY WARRANTS DENIAL

CP's delay should not be rewarded. Instead, the untimely nature of this motion warrants denial. Intirion identified CP's lack of evidence showing public availability in its preliminary response on January 17, yet CP apparently did nothing. CP likewise did nothing following the Board's institution decision, which noted the public availability dispute. On April 24, Intirion timely served objections reiterating its objection to ISDU. CP waited until April 30 to attempt to contact the Northeastern library. This was too late. Rather than provide Intirion with timely supplemental evidence, late in the evening on May 8, CP notified Intirion that it would be requesting discovery from the Board. As Intirion noted at that time, CP failed to even offer to meet and confer, let alone actually do so. *See* Trial Practice Guide at 29.

CP cannot be allowed to delay, skirt the rule, jam in evidence (especially evidence that is not useful), to the prejudice of Intirion and non-parties.

III. CONCLUSION

For the above reasons, CP's motion should be denied.

Dated: June 3, 2024

/s/ R. Scott Johnson

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Corporation*

CERTIFICATE OF SERVICE

Per agreement of the parties and pursuant to 37 C.F.R. ¶ 42.105(b), the undersigned certifies that a copy of this Patent Owner's Opposition to Petitioner's Motion Under 37 C.F.R. § 42.52(a) to Apply for a Subpoena Under 35 U.S.C. § 24 to Compel Testimony and Production of Documents from Northeastern University was served on June 3, 2024, by email on the following:

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